UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

L & S MECHANICAL CORP.

and **Case Nos. 2-CA-34716-1**
2-CA-35181-1

ALVA RONNIE RECAI, An Individual[1]

***Simon-Jon H. Koike,* New York, NY,**
for the General Counsel.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed on June 28, 2002 in Case No. 2-CA-34716-1 by Alva Ronnie Recai, An Individual (Recai), and based on a charge filed on February 26, 2003 in Case No. 2-CA-35181-1 by Recai, a complaint was issued on April 11, 2003 against L & S Mechanical Corp. (Respondent).

The complaint alleges essentially that on June 27, 2002,[2] the Respondent discharged Recai because of his activities in behalf of Plumbers Local Union No. 1, United Association (Union). The complaint further alleges, and the Respondent admits, that in disposition of the discharge, which was alleged in Case No. 2-CA-34716-1, the Respondent entered into an informal settlement agreement, which was approved on October 31. The Respondent further admits that the settlement agreement required it to reinstate Recai, and that on about December 3, the Respondent reinstated him to employment with it.

The complaint next alleges that on December 24, the Respondent reduced Recai's wages by withholding his annual bonus, and that on December 27, the Respondent again discharged Recai because of his Union activities. The complaint asserts that by discharging Recai on December 27, the Respondent violated the terms of the settlement agreement, and the Regional Director ordered that it be vacated and set aside.

The Respondent's answer denied the commission of the alleged unfair labor practices, and on July 21, 2003, a hearing was held before me in New York, NY. The Respondent made no appearance at the hearing.[3]

On the entire record, including the credited testimony of Recai, the sole witness, I make the following:

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[1] The caption was amended at the hearing to include Recai's first name, Alva.

[2] All dates hereafter are in 2002 unless otherwise stated.

[3] At the opening of the hearing, Counsel for the General Counsel stated that he was informed by counsel for the Respondent that neither he nor the Respondent would appear at the hearing.

Findings of Fact

I. Jurisdiction

The Respondent, a New York corporation, having its office and place of business in Woodmere, New York, is engaged in the business of providing and performing plumbing construction services and related services. Annually, the Respondent purchases and receives at its facilities goods and materials valued in excess of $50,000 directly from suppliers located outside New York State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Recai began work for the Respondent in June, 1999, performing gas installation in residential dwellings. His starting salary was $15.00 per hour which was raised in about December, 2001 to $20.00 per hour.

On June, 25, 2002, Recai signed an application for membership in the Union, listing his employer as L & S Mechanical. The following day, a letter was addressed to the Respondent from George Reilly, the Union's Financial Secretary-Treasurer. The letter stated that Recai is a member of the Union, having been initiated on June 19 as a "Plumber Helper". The letter advised that "his wages are to be paid as a Helper from the time he becomes a member as per the Labor/Management Agreement."

The following day, June 27, while working at a jobsite in Castle Hill Avenue in the Bronx, Recai was called on his walkie-talkie by the Respondent's admitted foreman and agent Richard Hogan. Hogan asked him if he had filled out an application to become a member of a union and Recai admitted having done so. Hogan said that if he (Recai) was a member of a union, "Mitch had asked him to fire me." The man referred to as "Mitch" was identified by Recai as Mitchell Berman, the admitted Field Supervisor and statutory supervisor of the Respondent. Recai also identified Berman as the owner of the company.

Recai immediately phoned Berman, who asked if he was a member of a union. Recai again admitted his union membership status. Berman said that if he was a member "that he was going to have to fire me because he's not a union shop." Berman asked Recai where is your "allegiance?" Recai did not reply. Berman asked him to leave the job site immediately, and he did.

Upon leaving the site, Recai met Hogan who said that Berman sent him to the site to make sure that he left the jobsite and that he did not "leave with anything." Hogan offered that "Mitchell Berman is a scumbag enough" that, if Recai filed for unemployment insurance, he would claim that he did not fire Recai, but rather Recai quit, so that he would not be eligible for unemployment insurance.

Thereafter, Recai filed a charge with the Board on June 28, which was settled pursuant to an informal settlement agreement, and was approved by the Regional Director on October 31. Pursuant to the settlement agreement, the Respondent reinstated Recai on December 3.

In December in each of his three years of employment, Recai received a bonus. In 1999, he received $100.00. In 2000, he received $200.00, and in 2001 he received $300.00.

On December 24, 2002, foreman and admitted agent Joseph Donohoe directed that all the employees report to the job shanty at noon to "collect their bonus checks." When he arrived, Recai saw all of his co-workers, about 15 employees, who were working at the 117th Street jobsite. He observed Donohoe giving out envelopes containing cash and a Home Depot gift card to all his fellow employees. However, Recai was not given an envelope and did not ask Donohoe about this apparent omission.

Three days later, on December 27, Donohoe approached Recai at about 3:15 p.m. at the jobsite and told him that he was "laid off because things were getting slow. He said it's not like he has a problem with my work or anything. He likes the way I work. I work fast and neat. They just have to let me go." Recai stated that of the 15 employees working that day, he was the only one laid off that day. He said good-bye to his co-workers who were surprised that he was laid off. He received his last pay check that day.

Following his lay off, or discharge as termed in the complaint, Recai was not recalled or contacted about returning to work, or was told that he would be considered for future hire. The Respondent's payroll records reveal the following: In the pay period ending December 5, 2002, immediately following Recai's reinstatement, 18 workers were employed. Two weeks later, December 19, a total of 22 employees worked for the Respondent. Thereafter, on January 2, 2003, which was the week when Recai was terminated, 19 employees were employed. Thereafter, in the weeks of January 16, January 30, and February 14, there were 18, 19, and 22 employees employed, respectively.

Analysis and Discussion

In order to establish a violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish four elements by a preponderance of the evidence.

> First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002).

Once the General Counsel has made the showings required above, the burden shifts to the employer to demonstrate that it would have discharged the employee even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980).

The evidence establishes that Recai engaged in union activities by signing an application for membership in the Union on June 25, 2002, and that the Union addressed a letter to the Respondent the following day informing it that Recai was a Union member and advising it that he was to be paid pursuant to the "Labor/Management Agreement." The next day, June 27, foreman Hogan, an admitted agent of the Respondent, asked Recai whether he was a member of a union and when he admitted that he was, Recai was told that he would have to be discharged. Recai also told Berman, the Respondent's admitted supervisor, that he was a union member, and was told that he was discharged because the Respondent was not a union shop. This last reference undoubtedly refers to the Union's letter that directed that the Respondent pay Recai pursuant to a collective-bargaining agreement.

The above evidence clearly establishes that Recai engaged in union activities by joining the Union, that the Respondent was aware that he became a Union member, and that it discharged him because of his Union membership.

Inasmuch as the Respondent did not appear at the hearing and offered no evidence to rebut the above facts, I find that that the Respondent violated Section 8(a)(1) and (3) by discharging Recai on June 27, 2002. *Wright Line,* above.

Following the filing of the charge, the above case was settled and Recai was reinstated on December 3, 2002. Only three weeks later, Recai was denied an annual bonus. As set forth above, Recai had received a steadily increasing bonus in each of the prior three years of his employment. However, on December 24, 2002, he did not receive a bonus although all the other employees received one. It is clear that the Respondent harbored animus toward Recai because of his union membership as set forth above. Moreover, the fact that all employees were given a bonus establishes disparate treatment toward Recai which has not been explained by the Respondent. I accordingly find that by failing and refusing to give Recai an annual bonus on December 24, 2002, the Respondent violated Section 8(a)(1) and (3) of the Act. *Property Markets Group*, 339 NLRB No. 31, slip op. at 13 (2003).

Only three days later, on December 27, Recai was again discharged. In view of Recai's unlawful discharge on June 27, the unlawful denial of his annual bonus on December 24, and the clear expression of animus toward Recai because of his union membership made in June, I find that Counsel for the General Counsel has established that the union activities and membership of Recai was a motivating factor in the Respondent's decision to discharge him. The fact that Recai was the only employee laid off allegedly for lack of work, and that he was the subject of Berman's union animus, creates an inference that his termination was related to his membership in the Union, absent a reasonable alternative explanation. *Triple H Electric Co.*, 323 NLRB 549, 553 (1997); See *Landmark Installations, Inc.,* 339 NLRB No. 59, slip op. at 6 (2003).

Hogan told Recai that he was being laid off because "things were getting slow. They just have to let [you] go." The Respondent, not having appeared at the hearing or made any explanation of its alleged layoff of Recai, has not proven that it would have laid him off even in the absence of his union activities. *Wright Line*, above. Despite being served with a subpoena calling for documents which could prove its purported defense, supervisor Berman did not appear at the hearing.[4] In addition, the Respondent's payroll records establish that in the week of his alleged layoff, January 2, 2003, 19 employees were employed. Thereafter, an increase in employment occurred, with the number of workers rising to 22 in the week of February 14, 2003. The documented increase in the number of employees following Recai's layoff stands in marked contrast to Hogan's statement that work was becoming slow.

It therefore is apparent that the Respondent has not established that its work was slow or that Recai was selected for layoff in a nondiscriminatory manner. *Regency Service Carts,* 325 NLRB 617, 626 (1998); *Goldtex, Inc*., 309 NLRB 935, 940 (1992). I accordingly find and conclude that the Respondent's discharge of Recai on December 27, 2002 violated Section 8(a)(1) and (3) of the Act.

[4] The subpoena requested documents reflecting the names of employees laid off, records showing how the Respondent selected employees for layoff, and records relating to the job that Recai was working on at the time of his layoff.

The Regional Director properly set aside the settlement agreement.

> The Board has long held that a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed. *Twin City Concrete,* 317 NLRB 1313 (1995).

In order to properly set aside a settlement agreement, the subsequent or continuing unfair practices must be "substantial" and not "isolated". *Oster Specialty Products*, 315 NLRB 67, 74 (1994).

Inasmuch as I find that the Respondent has committed postsettlement unfair labor practices which are substantial, I find that the settlement agreement has been properly set aside. The postsettlement unfair labor practices which I have found include the failure and refusal of the Respondent to give Recai an annual bonus and the discharge of Recai on December 27, 2002.

The substantial postsettlement unfair labor practices are of a like nature to those allegations which had been settled, and as to which Respondent agreed that it would not commit. The postsettlement violations were not isolated. They were part of the Respondent's continuing animus, presettlement and postsettlement, toward Recai because of his Union membership. The discharge of Recai because he became a Union member, and the refusal to give him an annual bonus, amounted to substantial unfair labor practices. They arose in the course of Respondent's animus toward Recai because of his union activities. Particular emphasis must be given to the fact that the unlawful discharge of Recai in June was followed by his reinstatement pursuant to a Board settlement agreement, and then another unlawful discharge only three and one-half weeks later.

I accordingly find that the Regional Director properly revoked the settlement agreement.

Conclusions of Law

1. By discharging Alva Ronnie Recai on June 27, 2002, and on December 27, 2002 because of his union activities and union membership, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. By reducing the wages of Alva Ronnie Recai by withholding his annual bonus because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Alva Ronnie Recai, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as

computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent must also make Recai whole for its failure to grant his annual bonus which was unlawfully denied.

The General Counsel requests, and I agree, that a broad order is warranted. In this case, the Respondent unlawfully discharged Recai on June 27, 2002, reinstated him on December 3, unlawfully withheld his annual bonus on December 24, and then again unlawfully discharged him on December 27. These facts clearly show the Respondent's disregard for its employees' Section 7 rights. Although going through the motions of complying with the settlement agreement it executed by reinstating Recai, it kept him in its employ for only three and one-half weeks thereafter. The Board has specifically stated that a broad order is warranted in cases involving repeat offenders and egregious violators of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, L & S Mechanical Corp., Woodmere, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Plumbers Local Union No. 1, United Association, or any other union.

(b) Unlawfully failing and refusing to grant employees annual bonuses because of their union membership and activities in support of the Union.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Alva Ronnie Recai full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Alva Ronnie Recai whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision, including the payment of the 2002 annual bonus, which was unlawfully denied him.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the unlawful denial of the 2002 annual bonus, and within 3 days thereafter notify Recai in writing that this has been done and that the discharges and the unlawful denial of the 2002 annual bonus will not be used against him in any way.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Woodmere, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 27, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

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Steven Davis
Administrative Law Judge

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Plumbers Local Union No. 1, United Association, or any other union.

WE WILL NOT unlawfully fail and refuse to grant employees annual bonuses because of their union membership and activities in support of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer Alva Ronnie Recai full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Alva Ronnie Recai whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL pay Alva Ronnie Recai the 2002 annual bonus, with interest, that he would have received but for the discrimination against him.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Alva Ronnie Recai and the unlawful denial of his 2002 annual bonus, and within 3 days thereafter notify Recai in writing that this has been done and that the discharges and the unlawful denial of the 2002 annual bonus will not be used against him in any way.

_____
L & S MECHANICAL CORP.

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza, Room 3614, New York, New York 10278–0104, Telephone 212–264–0346.